PP

v.

MASTOR IBRAHIM & ANOTHER APPEAL

HIGH COURT MALAYA, MELAKA
AHMADI ASNAWI J
[CRIMINAL APPEALS NO: 42 PP(A)-39-2010
& 42 PP(A)-40-2010]
17 APRIL 2012

CRIMINAL LAW: *Corruption - Corruptly receiving gratification - Whether accused discharged burden of proof - Whether defence were mere denials - Whether defence an afterthought - Whether presumption under s. 42(1) of the Anti-Corruption Act 1997 applied - Whether prosecution established case beyond reasonable doubt - Anti-Corruption Act 1997, ss. 10(a)(bb) & 42(1)*

CRIMINAL LAW: *Corruption - Offence of hindrance - Accused running away from custody - Whether delaying execution of duties of officers of Badan Pencegah Rasuah - Whether accused under lawful arrest at material time - Whether prosecution proved case against accused beyond reasonable doubt - Anti-Corruption Act 1997, s. 29(b)*

EVIDENCE: *Cross-examination - Defence counsel's failure to cross-examine prosecution witnesses - Whether amounted to acceptance of testimony - Whether defence an afterthought - Whether prosecution witnesses creditworthy*

The respondent was charged under s. 10(a)(bb) of the Anti-Corruption Act 1997 ('the Act') for corruptly receiving a gratification in the sum of RM570 from PW1 as an inducement to reduce the issuance of traffic summons (first appeal). In the second appeal, he was charged under s. 29(b) of the Act for delaying PW8, the officer of Badan Pencegah Rasuah ('BPR'), in the execution of his duties under the Act where he was alleged to have run away from the custody of PW8 while being transported to the BPR office in Melaka after his arrest. The respondent was acquitted and discharged of both charges by the Sessions Court Judge ('SCJ') and hence this appeal by the prosecution. The SCJ decided that the respondent had discharged his burden to cast a reasonable doubt on the prosecution's case, wherein the SCJ appeared to have accepted the respondent's contention that he did not receive the sum from PW1 and that

A the sum was more likely to have been placed inside the pocket of the trousers by PW1 or one of the BPR officers. The issue that arose for determination was whether, on the facts and evidence, the respondent had succeeded to cast a reasonable doubt over the factum of the receiving/acceptance of the said RM570.

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Held (convicting the respondent on both charges):

(1) The evidence of crucial importance to the respondent's defence was never suggested to PW1 or other prosecution witnesses hence denying them of the opportunity to rebut, C agree, deny or explain the narratives averred by the respondent. Thus, the defence had failed to cross-examine PW1 on crucial parts of the case and such failure amounted to an acceptance of PW1's testimony that he gave the sum to the respondent. Further, the respondent's defence that he D did not receive the sum from PW1 at any point of time was an afterthought, as it was evidently raised for the first time only in his testimony during the defence stage. (paras 14-17)

(2) The testimonies by the BPR officers were creditworthy and E there was no cogent reason to dismiss the testimonies. The respondent also had never suggested that it was PW1 or one of the BPR officers, who had placed the sum inside one of the pockets of the trousers from which the sum was recovered. The respondent further had not adduced sufficient F evidence to suggest that the said prosecution witnesses were propelled by self serving motives to falsely implicate the respondant with the commission of the offence. In the circumstances, the findings by the learned SCJ was devoid of any foundation. (paras 24 & 27)

G

(3) The discrepancies between the witnesses were minor and immaterial, insufficient to destroy their credibilities and was not in any way capable of eroding the substratum of the prosecution's case. The discrepancies also did not dislodge the H factum that the said sum was recovered from one of the pockets of the trousers belonging to the accused. It was clear that the respondent had failed to discharge the burden placed upon him *ie,* to cast a reasonable doubt against the prosecution's case. As such the presumption under s. 42(1) of I the Act operated against him that the sum had been given to and received by him as an inducement to reduce the issuance of traffic tickets. (paras 30 & 31)

(4) There was overwhelming evidence that the respondent was at all times under lawful arrest and the custody of the BPR officers, in particular PW8, in conformity with the requirements of s. 11(1) of the Criminal Procedure Code. The non-production of the notice of arrest as evidence in the court could not make the arrest unlawful or illegal nor capable of altering the fact that the respondent was under the lawful custody of the BPR officers. (para 41)

(5) The respondent admitted to running away from the car but sought to justify the same on the grounds, *inter alia*, verbal abuse, physical assaults and threats heaped upon him by the BPR officers. Nevertheless these grounds were afterthoughts and devoid of any basis. His act of running away had delayed PW8 in the execution of his duties under the Act and therefore the prosecution had proved its case against the respondent beyond a reasonable doubt as per this offence. (para 62)

(6) The crime committed by the respondent now ranked among the top public enemies of the nation with far reaching financial, economic, social and political consequences. In the circumstances, public interest must take precedence over the personal interest of the respondent. A custodial sentence was hence warranted. (para 64)

[The respondent was sentenced to 18 months' imprisonment and fine of RM10,000, in default six months' imprisonment for the first appeal and fine of RM3,000, in default three months' imprisonment for the second appeal.]

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Attan Abdul Ghani v. PP [1969] 1 LNS 12 HC ***(refd)***
Chua Beow Huat v. PP [1968] 1 LNS 24 HC ***(refd)***
Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Datuk Haji Harun Haji Idris (No 2) [1976] 1 LNS 97 HC ***(refd)***
PP v. Kamaruzaman Sudin [2009] 1 LNS 396 HC ***(refd)***
PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162 HC ***(refd)***
PP v. Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113 CA ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 10(a)(bb), 29(b), 42(1), 45(3), (4), (5), (6), (7)
Criminal Procedure Code, s. 11(1)

For the prosecution - Rozizah DPP; AG's Chambers
For the respondent - Yau Jiok Hua; M/s Yau Jiok Hua & Co

Reported by S Barathi

JUDGMENT

Ahmadi Asnawi J:

[1] Two charges were proffered against the accused/respondent.

[2] In Criminal Appeal No. 42 PP(A)-39-2010 the respondent was charged under s. 10(a)(bb) of the Anti-Corruption Act 1997 (hereinafter referred to as "the Act") for corruptly receiving as gratification for himself the sum of RM570 from PW1 as an inducement to reduce the issuance of traffic summons involving motorlorries committing traffic offences belonging to PW2.

[3] In Criminal Appeal No. 42 PP(A)-40-2010 he was charged under s. 29(b) of the same Act for delaying one Khairul Azidi bin Yahidin (PW8), a Penolong Penguasa, Badan Pencegah Rasuah (BPR), Negeri Melaka in the execution of his duties under the said Act. He was alleged to have escaped ie, running away from the custody of the said officer while being transported to the BPR office in Melaka after his arrest.

[4] The two cases were jointly tried before the learned Sessions Court Judge (SCJ). The facts of the case were in substance as that enumerated by the learned SCJ in her alasan penghakiman at pp. 8 to 11 of the rekod rayuan (RR).

[5] The respondent was acquitted and discharged in respect of both the charges at the end of the prosecution's case by the then presiding SJC (Puan Sabariah Attan) on 6 October 2006.

[6] Subsequently, the appeals by the prosecution in respect of the said acquittals were allowed by the High Court and on both counts, the respondent was ordered to enter his defence.

[7] The defence stage of both the cases was heard by another SCJ (Puan Elesabet Paya Wan). Yet again the respondent was acquitted and discharged of both the charges at the close of the defence case.

[8] Hence these appeals now before me lodged by the prosecution against the said acquittals. A

Criminal Appeal No. 42 PP(A)-39-2010

[9] As the High Court has ordered the respondent to enter his defence, in the absence of a written ruling, it must be taken that the High Court had ruled that the prosecution had made out a *prima facie* case against the respondent in respect of the charge leveled against him in the above said case. It follows that it must necessarily mean that all the relevant ingredients of the said charge has been proven by the prosecution at the end of its case. Hence it must be taken that the factum of payment of the said money made by PW1 and acceptance or receipt of the said money by the respondent was firmly established. Arising therefrom, it must equally be taken that it was the High Court's ruling that the statutory presumption under s. 42(1) of the said Act arose that the money has been given to and received corruptly by the respondent as an inducement to reduce the issuance of traffic tickets involving PW2's motorlorries – see *Attan Abdul Ghani v. PP* [1969] 1 LNS 12; *PP v. Yuvaraj* [1968] 1 LNS 116; *Thavanathan Balasubramaniam v. PP* [1997] 3 CLJ 150. B C D E

[10] The burden is now shifted to the defence to rebut the said presumption on a balance of probabilities as established in *PP v. Yuvaraj (supra); Thavanathan Balasubramaniam v. PP (supra); Ku Yahya Ku Bahri & Anor v. PP* [2000] 3 CLJ 162; *PP v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113; *Attan bin Abdul Gani v. PP (supra)*. F

[11] Having perused through the alasan penghakiman, the learned SCJ appears to have accepted the respondent's contention that he did not receive the said money from PW1. She opined that the defence had raised a reasonable doubt in so far as the acceptance of the corrupt money is concerned. She is correct in applying the said test as the burden placed upon the respondent in respect of the said acceptance or receipt is merely to cast a reasonable doubt. The respondent's burden to rebut the presumption under s. 42(1) of the Act on a balance of probabilities only applies once it was proved that the money RM570 has been given and received by the respondent. In the last paragraph of p. 17 of the RR she stated: G H I

A Atas alasan demikian Mahkamah berpendapat dan menerima pembelaan OKT bahawa adalah lebih berkemungkinan wang bertanda yang dijumpai di pakaian atau seluar kerja OKT semasa OKT dibawa turun semula dari atas rumah ke bawah, boleh dimasukkan oleh sesiapa. Ini adalah keraguan yang munasabah, yang telah dibangkitkan oleh OKT.
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At p. 20 of the RR she again stated:

Berdasarkan alasan-alasan tersebut, Mahkamah berpendapat OKT telah berjaya menimbulkan satu keraguan yang munasabah atas kes pendakwaan dan dengan ini melepaskan dan membebaskan OKT daripada kedua-dua pertuduhan.
C

[12] Hence the issue for determination would be whether on the facts and evidence, the respondent has succeeded to cast a reasonable doubt over the factum of the receiving/acceptance of
D the said RM570.

[13] Undeniably the defence of the respondent was focused on non acceptance of the said money. In his defence, the respondent denied the corrupt practice of demanding monthly payments from
E lorry operators in town. He denied knowledge of such monthly collections/payments. He denied directing PW1 and other policemen under his command to collect the said monthly payments from lorry operators on his behalf. He denied that PW1 was his principal hench-man to collect the said monthly payments
F from PW2 on his behalf. In particular he denied that on the day in question he had directed PW1 to bring to him at his house the sum PW1 had collected earlier in the day from PW2. He denied accepting the said sum (RM570) from PW1 in PW1's car in front of his house. He denied knowledge of what the said sum was for.
G His defence was "… semasa saya hendak keluar dari kereta, dia mohon sekali lagi supaya saya simpan duit yang RM500 itu. Saya kata tidak mahu. Saya terus tutup pintu kereta dan terus masuk ke dalam rumah …". This is the essence of the respondent's defence, that is, he did not take or receive the said sum from
H PW1.

[14] However, this part of the evidence which was of crucial importance to the respondent's defence was not ever suggested to PW1 in particular nor generally to the other BPR officers involved
I in the operation. Thus the prosecution witnesses, particularly

PW1, were denied the opportunity to rebut, agree, deny or explain the narratives averred by the respondent. In *Chua Beow Huat v. PP* [1968] 1 LNS 24, the learned judge enumerated the implication of failure of putting forth the material case during the cross-examination of the opponent witness as follows:

> Mukharji in the Indian case said – the law is very clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the otherside of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It had been stated on high authority of the House of Lord that this much a counsel is bound to do when cross-examination that he must put to each of his opponent's witness in turn, so much of his own case as concerns that particular witness or in which that witness had any share …

[15] In fact from the line of cross-examination posited by respondent's learned counsel to PW1 reproduced below, there appears to be an admission by the respondent that he did receive/ accept the said money but for a different purpose:

> Q: Setujukah kalau dicadangkan, saya andaikan kamu beri wang kepada OKT untuk simpan dan kamu akan ambil semula selepas balik kampong, itu tidak salah?
>
> J: Tidak setuju.

[16] Additionally it was never suggested to PW1 that the said money was not or was never given to the respondent. Equally it was never suggested to PW1 that the respondent did not at any time receive or accept the said money from PW1. Hence it is clear that the defence failed to cross-examine PW1 on crucial parts of the case. It is trite that such failure will amount to an acceptance of the PW1's testimony that he gave the said sum to the respondent for the purposes enumerated in the charge – see *Wong Swee Chin v. PP* [1980] 1 LNS 138, where it was ruled that "… there is a general rule that failure to cross-examine a witness on a crucial part of the case, will amount to an acceptance of the witness's testimony".

[17] It is equally trite that it behoves upon the defence to put its case or defence at the earliest possible stage during the prosecution's case itself. Otherwise such failure may render the same to be liken or branded as a recent invention or afterthought incapable of being accorded the due weight it deserves – see *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154. In this case before me, the respondent's defence that he did not receive the said sum from PW1 at any point of time was evidently raised for the first time only in his testimony during the defence stage. In the whole circumstances of the case, I am fully with the learned TPR's submission that such line of defence is merely an afterthought.

[18] The respondent next testified that upon leaving PW1's car, he went back into his house and went upstairs to retire for the day. It was the fasting month in Ramadan. About 10 minutes later he heard knocks on his front door. He came down and opened the door. Five (5) people were outside the door. They identified themselves as BPR officers. One of them asked him where is the money. The respondent didn't respond. The BPR officers then searched the ground floor. They failed to find the money. Next the BPR officers took the respondent upstairs. All the five officers went upstairs. They searched the rooms upstairs. They failed to find the money.

[19] Next they came downstairs. On the way down at the stairs, the respondent saw one of the BPR officers picking up one of his trousers hanging on the wall. He was ordered to bring the said trousers to the middle room (bilik tengah) on the ground floor. Now he saw PW1 and several other BPR officers were there too. He was asked to empty the pockets of the said trousers. He thought he was a tad too slow. One of the BPR officers took over and searched the pockets. He saw monies tumbling out of one of the pockets. He was shocked.

[20] Upon the narratives enumerated above and the discrepancies she found emanating from the testimonies of PW8, PW10, PW11 and PW15 in respect as to the manner in which the said money was found, the learned SCJ accepted the respondent's defence and found that it was more likely (she employed the words – lebih berkemungkinan) that the said monies could have been placed inside the said pocket of the said trousers by anyone and this is the reasonable doubt raised by the respondent – see last paragraph of p. 17 of the RR.

[21] Additionally she took into consideration that PW1 was arrested earlier by BPR and arising from the arrest, the said trap was laid against the respondent. She also took into account PW1's testimony that "... BPR kata, saya akan dituduh sebab saya ambil duit dari Pang. Itu kesalahan saya. BPR kata, duit itu saya kutip untuk diberikan pada OKT. Saya setuju, itu BPR yang kata ...". Pang is PW2.

[22] Taking into account the above and the fact that PW1 and other BPR officers were in the room downstairs when the said money was recovered from one of the pockets of the said trousers, the learned SCJ again found that it is more likely that the said money was placed there by PW1 or others who were with PW1 – see third paragraph of p. 18 of RR.

[23] However the learned SCJ did not assign any reason as to why she rejected the testimony of PW1 that he gave the said RM570 to the respondent from inside his car in front of the respondent's house. Equally no reasons were given as to why the testimonies of the BPR officers (PW8, PW9, PW10, PW11 and PW15) who retrieved the said trousers, found, recovered and saw the said money being retrieved from inside one of the pockets of the said trousers were rejected. I have perused through the evidence of these witnesses and found their evidence to be cogent, uncontroverted, capable of being believed and managed to withstand the test of cross-examination mounted against them. Their testimonies did not appear to have suffered from latent deficiencies to dilute their credit worthiness. Hence I could not find any reason cogent enough to dismiss the testimonies of these witness in respect of the acceptance of the said RM570 by the respondent and the recovery of the said sum by the said BPR officers.

[24] Of greater relevance is the fact that the respondent did not at any point of time pointed a finger at PW1 that it was PW1 who had placed the said sum inside one of the pockets of the said trousers. The respondent also did not allege that either one of the BPR officers was responsible for having the said sum inside the said pocket. Equally this issue that the said sum was placed inside the said pocket by one of the prosecution witnesses was never put or suggested to any of the relevant prosecution witnesses during the cross-examination of those witnesses. His only defence was that he has no knowledge as to how the said

A sum ended in the said pocket. At the same time the respondent did not dispute that the said trousers was in fact his and was hanged on the wall at the time it was picked up by one of the BPR officers. He did not also testify that this same trousers had been searched by the BPR officers before they proceeded to
B search the rooms upstairs.

[25] Hence in the light at the above, in my view by finding that the said sum was more likely to have been placed inside the said pocket by PW1 or by one of the BPR officers who were with
C PW1, the learned SCJ was in fact offering or creating defences for the respondent which obviously she has no business to do so. Her findings was against the grain of the evidence adduced, bareth of factual basis.

D **[26]** Concurrently I could find no motive for PW1 or the BPR officers to do so. The respondent has not shown that these witnesses harboured an axe to grind against him to propel them to place the said sum inside the said pocket and to testify adversely against him. Neither were the relevant prosecution
E witnesses cross-examined on the issue of motive arising from bad blood or patent enmity. However, upon the totality of the respondent's evidence, it is very apparent that the respondent was in fact implying that the said sum was planted inside the said pocket by either PW1 or one of the BPR officers who were with
F him at the point when he was with other BPR officers upstairs. Thus if motive is the backbone of the respondent's defence, then the burden is upon the respondent to adduce sufficient evidence of this motive so as to raise a reasonable doubt in the prosecution's case. In *PP v. Kamaruzaman Sudin* [2009] 1 LNS 396 the learned judge stated:
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> Tiada keterangan yang menunjukkan SP2 bermusuh atau berdendam dengan tertuduh. Perkara ini tidak ditimbulkan atau ditanyakan kepada SP-2 dalam soalbalas (*Tengku Mahmood v. PP* [1974] 1 MLJ 110). Sehubungan dengan ini Mahkamah merujuk
> H kepada kenyataan Yong Pong How CJ di kes *Gan Too Choh v. PP* [2006] 2 SLR 220 di ms 299:
>
> > Since the defence did not adduce sufficient evidence of Punirah's alleged motive to frame the appellant, it was unnecessary for the prosecution to prove lack of motive in
> I the present case. With respect, counsel appeared to have misunderstood the statement in *Khoo Kwoon Main v. PP,*

> *supra* at 781. As I clarified in *Goh Han Hong v. PP* [2003] 4 SLR at 33, the passage in *Khoo Kwoon Main v. PP* from which that statement was lifted simply means that:
>
> Where the accused can show that the complainant has a motive to falsely implicate him, then the burden must fall upon the prosecution to disprove that motive. This does not mean that the accused merely needs to allege that the complainant had a motive to falsely implicate him. Instead the accused must adduce sufficient evidence of this motive so as to raise a reasonable doubt in the prosecution's case. Only then would the burden of proof shift to the prosecution to prove that there was no such motive.

PW1 may not want to stick his neck into the loop and has every reason to heap the whole blame upon the respondent. But he admitted taking and receiving the said sum from PW2. This is an unequivocal admission given under oath and by so doing he opened and risked himself to criminal prosecution which has no statutory limitation. Additionally there is no evidence that he was given immunity *in lieu* of testifying against the respondent. Be that as it may, his testimony that he collected the said sum from PW2 on behalf of and to be given to the respondent remains unshattered. Thus it could not be a ground to conclude that he could have been the one who placed the said sum inside the said pocket as was the finding of the learned SCJ.

[27] In the whole circumstances of the case I am of the view that the respondent has not adduced sufficient evidence to suggest that the said prosecution witnesses were propelled by motive or self serving motives to falsely implicate the accused with the commission of the offence. Hence again the said findings by the learned SCJ was devoid of any foundation.

[28] The learned SCJ also alluded to discrepancies in the testimonies of PW8, PW10, PW11 and PW15 in respect as to the manner in which the said sum was found. However she failed to particularise what the discrepancies were and how the said discrepancies would have compromised the recovery of the said sum, how it would have affected the credit-worthiness of those witnesses, how serious and material those discrepancies were and how the said discrepancies would have affected the outcome of the trial. At any rate the then High Court when directing the respondent to enter his defence, must have considered the so

called discrepancies and must have opined that the said discrepancies were either minor or immaterial or otherwise irrelevant.

[29] I have equally gone through the testimonies of the said witnesses and as in any other trials there are bound to be discrepancies in the testimonies of the witnesses on account that various persons are inherently endowed with varying powers of cognition, attentiveness, perception and the ability to remember past events in minute details. This much the court has to acknowledge and accept. Thus it is not surprising that 2 witnesses to a common event would describe it in slightly different ways or versions. The bottom line, however, is whether the presence of the said discrepancies is sufficient to destroy the credibilities of the said witnesses – see *PP v. Datuk Haji Harun Haji Idris (No 2)* [1976] 1 LNS 97.

[30] Here in this case before me I am satisfied that whatever discrepancies that was bothering the mind of the learned SCJ, the said discrepancies between the said witnesses were minor and immaterial, insufficient to destroy their credibilities and did not in any way capable of eroding the substratum of the prosecution's case. The said discrepancies did not dislodge the factum that the said sum was recovered from one of the pockets of the trousers belonging to the accused.

[31] In all the circumstances of the case, I am of the view that the defence posited by the respondent in respect of the receipt/acceptance of the said RM570 were mere denials laced with elements of afterthought. He denied the practice of collecting monthly payments from lorry operators in town. He denied that PW1 was his principal hench-man to collect the said monthly payments from PW2. He denied directing PW1 to bring the said sum to his house to be given to him. He denied receiving the said sum from PW1. He denied knowledge as to how the said sum was found in one of the pockets of his trousers hanged on the wall. Such denials without more could not hold water against the evidence adduced by the prosecution. As such it is incapable of dislodging the prosecution's case – see *PP v. Ling Tee Huah* [1980] 1 LNS 212. Clearly the respondent had failed to discharge the burden placed upon him ie, to cast a reasonable doubt against the prosecution's case that he had received the said RM570 from

PW1. As such the presumption under s. 42(1) of the Act operates against him in favour of the prosecution that the said sum has been given to and received by him as an inducement to reduce the issuance of traffic tickets involving PW2's motorlorries committing traffic offences.

[32] DW2's evidence that he was once forced by the BPR to admit that the respondent had directed him to collect monthly payments from lorry operators in town and was assaulted by the BPR officers on account of his refusal to do so is of little assistance to the respondent's defence. He was not privy to the instructions given to PW1 by the respondent. He was not privy when the said RM570 was given to and was received by the respondent. He was also not privy when the said sum was recovered by the BPR officers from one of the pockets of the trousers belonging to the respondent. Additionally the testimony of PW13 was on all fours with the testimony of PW1 that the respondent had directed him to collect such monthly payments from lorry operators and had in fact done so from three or four lorry operators on few occasions on behalf of the respondent.

[33] The respondent offered no further evidence to rebut the said presumption apart from denying receipt/acceptance of the said sum. Verily on a balance of probabilities the respondent had clearly failed to rebut the said presumption operating against him. On all fours the prosecution has proven its case against the respondent beyond a reasonable doubt. Hence it is my finding that the respondent is guilty of committing the said offence particularized in the charge and is convicted thereof of the offence. The order of discharge and acquittal in respect of the same by the learned SCJ is thus set aside without more.

Criminal Appeal No. 42 PP(A)-40-2010

[34] As reiterated earlier the learned High Court Judge also ordered the respondent to enter his defence in respect of the above case. Again at the risk of being repetitive it must be taken that the High Court had ruled that the prosecution had made out a *prima facie* case against the respondent in respect of the said charge. Equally it follows that it must necessarily be taken that all the ingredients of the charge has been proven by the prosecution at the end of its case.

[35] Hence it must also be taken that the learned judge has considered every issue that has to be considered relating to the propriety and legality of the respondent's arrest at the time the respondent attempted his escape by running out of the car when the car stopped at the traffic lights at Persimpangan Lampu Isyarat Masjid Al-Azim inspite of the non-production of the notice of arrest under s. 45(3) of the said Act.

[36] The learned SCJ appears to be truly bothered by the non production of the said notice of arrest. In the second paragraph of her alasan penghakiman appearing at p. 20 of the RR, she stated:

> Notis ini tidak dikemukakan di Mahkamah sepanjang kes pendakwaan. Mahkamah berpendapat sebaliknya sebab tanpa notis tersebut status OKT sebagai orang yang telah ditahan secara sah dikatakan melarikan diri tidak boleh ditentukan. Mahkamah berpendapat OKT tanpa notis tangkap tersebut tidak melakukan kesalahan dalam konteks pertuduhan kerana OKT tidak ditahan secara sah oleh pegawai BPR untuk suatu siasatan dijalankan.

[37] However, in my view as said earlier this issue has been settled when the learned High Court judge ordered the respondent to enter his defence. There was *prima facie* evidence and a *prima facie* finding that the respondent ran away from the car transporting him to BPR office in Melaka. Hence the status of the respondent ought not to be an issue anymore.

[38] Notwithstanding the same there was overwhelming factual evidence that the respondent was indeed under an arrest and was under the custody of the BPR officers at the material time of the incident. The evidence led by the prosecution indicated that he was immediately placed under arrest and handcuffed upon the recovery of the said RM570 (see evidence of PW6, PW8 and PW15). Thereafter notice of the said arrest was read to the respondent (see evidence of PW8). This evidence of arrest and the issue of the notice of arrest that was read to the respondent by PW-8 were not challenged by the defence.

[39] Next the respondent was taken to his office at Balai Polis Alor Gajah for further search. He was brought there in PW15's car, driven by PW15. PW6 was seated next to the PW15. PW8 was at the rear seat with the respondent. He was handcuffed at all material times during the journey to his office (see evidence of PW6, PW8 and PW15). At the Balai Polis and during the search

at his office, the handcuff was removed at the request of the respondent purportedly to save face. Nothing incriminating though was recovered from respondent's office. They then left for BPR office in Melaka. The respondent was again handcuffed (see evidence of PW6, PW8 and PW15). This evidence of the respondent being handcuffed was again not challenged by the defence.

[40] The respondent was taken to BPR office in Melaka again in PW15's car and driven by PW15. They maintained their respective seating positions in the car. The respondent was handcuffed throughout this journey (see evidence of PW6, PW8 and PW16). There was no challenge by the defence relating to the same. When the traffic lights at Persimpangan Lampu Isyarat Masjid Al-Azim turned red, PW15 stopped the car. The respondent next kicked opened the rear door, bolted and ran towards the kampong straddling the highway. The respondent appears to be a very fast runner. According to PW8 it took them about 10 minutes to re-arrest the respondent, quite a distance away from where the respondent had initially bolted. The defence did not really challenged this factual evidence.

[41] From the narratives relating to the factual evidence enumerated above, to all intents and purposes there can be no doubt that the respondent was at all times under the lawful arrest and custody of the BPR officers in particular PW8, who effected the said arrest. The respondent's arrest was in conformity with the requirements of s. 11(1) of the Criminal Procedure Code which provides that the person making an arrest shall actually touch or confine the body of the person to be arrested unless there is a submission to the custody by word or action. The fact that the respondent was put under handcuff at all material times and his movements restricted and confined to specific locations as determined by BPR officers are clear manifestations that the respondent was indeed under arrest. The non production of the notice of arrest as evidence in court could not make the said arrest unlawful or illegal nor capable of altering the fact that the respondent was under the lawful custody of the BPR officers, in particular PW8. Equally it could not render the status of the respondent while under the lawful custody of the BPR officers questionable as was found by the learned SCJ. All the more so when the said arrest affected by PW8 and PW8's testimony that the notice of the said arrest was read out to the respondent were never challenged by the defence.

[42] A careful reading of s. 45(3) of the said Act showed that the issuance and service of a written notice to any person arrested or is informed that he may be arrested for any offence under the said Act is not meant to be a notice that he is officially under arrest. The primary purpose of the said section is to explain to the person arrested of his rights upon arrest. The explanation which is advisory in nature clearly operates to the advantage of the person arrested. It provides a platform to the person arrested to lend his version of the events leading to his arrest at the earliest possible stage. He is asked if he wished to say anything. He is advised to mention it now if there is any fact which he intend to rely in his defence in court.

[43] He is also advised that if he holds it back till he goes to court, his evidence may be less likely to be believed and this may have a bad effect on his case in general. Finally it states that if he wished to mention any fact now and would like it to be written down, it will be done.

[44] From the above, it is clear that the notice under s. 45(3) is not about informing the person arrested that he is officially under arrest. It is about his rights upon or after his arrest. Equally it is about the admissibility of the arrested person's statement made pursuant to the service of the said notice. And the person arrested is not under any obligation to give a statement pursuant to the service of the said notice as the notice is merely advisory in nature. It is up to the person arrested whether he wish to say anything or to rely on any fact or otherwise.

[45] Additionally s. 45(4) of the Act talks about the admissibility of statement made by the arrested person before there is time to serve such notice upon him. Section 45(5) states that such statement made pursuant to the notice issued under s. 45(3) shall not be construed as a statement caused by inducement, threat or promise if it is otherwise given voluntarily. As regards to s. 45(6) it talks about inferences that may be drawn by the court upon the accused's failure to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so informed. Section 45(7) is co-related to the events in s. 45(6).

[46] In my view the whole purport of ss. (1) to (7) of s. 45 of the Act appears to focus on the admissibility of statements made by the person arrested or the accused upon or after his arrest. That is the primary purpose of s. 45. There is no mandatory requirement under any of the sub-sections of s. 45 that the person arrested or the accused must be served with an official notice that he had been arrested under the said Act. The said notice is only relevant if the prosecution intends to admit statements made by the person arrested or the accused pursuant to the service of the said notice. As said earlier the law also provides that such statement shall not be rendered inadmissible merely because such statement was made before there is time to serve such notice upon him. By such provision it is clear that it is not even mandatory to have such notice issued and served to admit the statement in evidence in certain circumstances. It is thus apparent that a notice issued and served under s. 45(3) of the Act to the person arrested or the accused does not purport to be a notice to him that he is officially under arrest and the failure to serve such notice does not equally nullify the said arrest. Hence the learned SCJ was clearly in error when she found that a notice under s. 45(3) is a prerequisite to the lawful arrest and custody of the respondent. She was equally in error with the finding that without such notice the status of the respondent while under the custody of PW8 could not be determined. In her own words the status of the respondent is questionable.

[47] Additionally I am of view that the arrest of the respondent is not a prelude to the commission of an offence under s. 29(b) of the Act. The section merely talks about any person who assaults, obstructs, hinders or delays any officer of the Agency in the execution of his duties under the Act. The word "any person" is wide enough. It included any person committing the acts enumerated above irrespective of whether he has been arrested or otherwise. Hence whether the person has been arrested or not is an irrelevant consideration in determining whether the offence has been committed by the person.

[48] The respondent was charged for delaying PW8 in the execution of his duties under the Act. The meaning of the word "delay" is plain enough and its application is equally wide enough. It encompasses acts or omissions which slows down or encumbered one's work.

[49] There is common ground between the TPR and learned counsel for the respondent that the respondent had indeed run away from the said car driven by PW15 when the car stopped at the said traffic light junction.

[50] In all the circumstances, there can be no doubt that the act of the respondent in running away from the car transporting him to BPR office in Melaka amounted to an act of delay and had delayed PW8 in the execution of his duties. Even learned counsel for the respondent agreed that the act of running away is also delay.

[51] As the learned SCJ did not go into the merits of the case, it is now incumbent upon me to go into its merits to determine the culpability of the respondent.

[52] The business of the respondent to extricate himself is to cast a reasonable doubt upon the prosecution's case that he ran away from the said car and thereby delaying PW8 in the execution of his duties.

[53] The respondent testified that he was not handcuffed throughout the journey from his house until the aforesaid incident at the traffic light junction. Throughout the journey he was verbally abused and physically assaulted by the BPR officers who were with him in the car. He singled out PW15 as the person who verbally abused and physically assaulted him the most. PW15 assaulted him in the car during the journey itself. The verbal abuse and assaults continued when the car stopped at the said traffic light junction. He could not take it anymore. He was afraid of being assaulted. Then PW15 shouted "Oi". He came to him, pushed him and he fell.

[54] His examination in chief continued (at p. 188):

> PB: Semasa kes pendakwaan awak dikatakan berlari, kenapa?
>
> SD1: Pegawai Bahagian Pencegahan Rasuah minta kerjasama tetapi saya dipukul, dimaki, dihamun, ditepok dengan kuat. Saya ditolak jatuh, dipukul, ditendang dan diterajang. Saya tidak melawan pun. Bila tengok saya tidak melawan dia orang ambil saya balik dan bawa masuk dalam kereta.

[55] In cross-examination the respondent testified that he was terrified of being threatened, opened the car door and left the car.

[56] Thus essence of the respondent's defence in short was that he could not take the verbal abuse, physical assaults and threats leveled at him anymore to account for his act of running away from the said car.

[57] As said earlier the evidence showed that PW15 was driving the said car and PW6 was seated next to PW15 and PW8 was seated at the rear seat with the respondent. In such event how could PW15 possibly have assaulted the respondent? He was driving the said car at the material time. Equally PW15 was not challenged during his cross-examination that he had assaulted the respondent during the journey in the said car. From their seating positions, logically only PW6 and PW8 would be in position to assault the respondent. But again there were no challenge mounted against PW6 and PW8 that they have assaulted the respondent in the car during the journey to Melaka. Likewise no questions were put to both PW6 and PW8 that PW15 had assaulted the respondent during the journey.

[58] The cross-examination of PW6 and PW8 also showed that both these witnesses were not challenged in respect of the verbal abuse allegedly leveled against the respondent by them. Not a single suggestion was put to them that they have verbally abused the respondent. As regards to PW15, the verbal abuse that were suggested consists of PW15 telling the respondent that "polis kuat makan rasuah" and "kamu ada beri OCPD RM20,000". And what were the threats about? The respondent glaringly did not elaborate what were the threats he was adverting to and the nature of such threats that propelled him to flee. By any stretch of the imagination such words as "polis kuat makan rasuah" and "kamu ada beri OCPD RM20,000" could not have amounted to threats nor verbal abuse grave enough to endanger life and limb to justify the respondent fleeing from the scene.

[59] From the above I could only conclude that the respondent's testimony in connection with the verbal abuse, physical assaults and threats heaped upon him by PW6, PW8 and PW15 were mere recent inventions. Additionally the respondent had testified that he had given his full co-operation to the BPR officers in respect of the search conducted in his house. He did not also resist his arrest. He obligingly followed the BPR officers to his office and the ensuing journey to BPR office in Melaka. In such

A event there is no reason whatsoever for the BPR officers, in particular those in the car transporting him to Melaka, to continually abusing the respondent.

[60] Likely wise the respondent's testimony that PW15 stopped
B the car at the said traffic light junction, came to him and pushed him causing him to fall down were evidently an afterthought on account that the same were raised for the first time only during his testimony. It was never suggested that it was so during the cross examination of PW15. Equally it was never suggested to
C PW6 and PW8 both of whom were there too and would have witnessed the same if it had happened as testified by the respondent.

[61] The respondent's medical report is of no assistance to the respondent either. It is marked IDD27. It is not in evidence. The
D maker was not called. The learned TPR was right in objecting to its admissibility on account of the same. Hence IDD27 is not evidence. It need not be considered at all. Additionally the said medical report was adverting to the alleged assault at BPR office taking place after the event at the said traffic light junction. It
E does not advert to the alleged assaults inflicted in the car during the journey to BPR office in Melaka that prompted the respondent to flee from the car at the said junction. IDD27 is apparently irrelevant for the purposes of the respondent's defence. On the other hand PW15's testimony that the respondent in his
F attempt to flee, fell face down on an uneven ground and suffered injuries on his face and palm was amply corroborated by the medical report P28. He was sent by the BPR officers to Hospital Besar Melaka on the same night he was brought back to BPR
G office in Melaka to be treated for the injuries suffered by him as a result of the fall.

[62] For all the reasons enumerated above, I am of the view that the respondent had failed to cast a reasonable doubt against the prosecution's case. He admitted running away from the said car
H but sought to justify the same on grounds grounded deep in afterthought devoid of any basis whatsoever. At any rate by committing what he had committed, in law no amount of justification would justify and exonerate the respondent from the clutches of the said s. 29(b) of the Act. By running away, the

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respondent had delayed PW8 in the execution of his duties under the said Act. Evidently the prosecution had proved its case against the respondent beyond a reasonable doubt.

[63] Hence it is my finding that the respondent is guilty of committing the said offence particularized in the charge and is convicted thereof of the offence. The order of discharge and acquittal in respect of the same by the learned SCJ is set aside without more.

Sentence

Criminal Appeal No: 42 PP(A)-39-2010

[64] The mitigation posited by the respondent before me are recorded in the notes of evidence. It sounds pretty familiar. Notwithstanding the same, I have given it a deep thought and concluded that public interest consideration must take precedent over the personal interest of the respondent. There can be no doubt that the conduct of the accused is most despicable. It is worst than day light robbery. At the material time the respondent was the Ketua Bahagian Trafik in his police district. However the respondent opted to betray the trust and abused the powers entrusted upon him by conducting himself in the most irresponsible manner. In all the circumstances of the case this is not a fit and proper case to grant mercy upon the respondent. The crime committed by the respondent now ranks among the top public enemies of the nation with far reaching financial, economic, social and political consequences. The offence committed by the respondent justifiably warranted a custodial sentence. It has to be deterred to prevent further harm to the nation and its people.

[65] I am fortified in my view following the decision in *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421 where the Federal Court stated, in p. 434:

> The offence of corruption, if unabated or undeterred, is far more reaching in its consequences than the crimes of robbery, criminal breach of trust or rape. Thus, we feel that the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offence.

A At p. 441 the Federal Court further stated:

> ... there is no doubt that in cases involving corruption, imprisonment would be a proper sentence, unless there are extenuating circumstances against the imposition of such a sentence.

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[66] I could find no extenuating circumstances existing in this case before me to warrant a sentence otherwise than a custodial one. Hence for all the reasons given, the respondent is sentenced to 18 months imprisonment. He is also ordered to pay a fine in
C the sum of RM10,000, in default six months imprisonment.

Criminal Appeal No: 42 PP(A)-40-2010

[67] In respect of this offence the respondent is ordered to pay a fine in the sum of RM3,000 in default of which he is to be
D imprisoned for three months. In the light of the sentence imposed in Criminal Appeal No: 42 PP(A)-39-2010 above, it would serve no further purpose to go harsher against the respondent.

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